Public Prosecutor v KATS Cleaning Services (S) Sdn Bhd

HIGH COURT (KOTA KINABALU) — CRIMINAL APPEAL K41-16-1994
SULEIMAN HASHIM J
19 DECEMBER 1994

Employment *— Social security — Contributions by employer — Employer charged for not making contributions to Social Security Organisation — Whether court could order payment of other contributions not included in charge — Employees' Social Security Act 1969 ss 94(c) & 94A(1)*

The defendants pleaded guilty to six charges of failing to pay contributions under s 7 of the Employees' Social Security Act 1969 ('the Act') and were fined RM300, in default two weeks' imprisonment in respect of each charge. The prosecution had tendered a certified statement of arrears of contributions under s 94A(1) read with s 94C of the Act which included arrears of contributions which were not confined to the subject matter of the six charges, amounting to RM21,774.50 ('the arrears'). The magistrate, however, declined to order payment of the arrears on the ground that the prosecution could only recover contributions which were the subject matter of the offence for which there was a finding of guilt. The prosecution appealed.

Held, allowing the appeal:

Under s 94A(1) of the Act, the court shall order any person found guilty of any offence under s 94(a) to pay 'any contributions, ... prior to the date of such finding of guilt' which are due and payable to the Social Security Organisation. There is no ambiguity as the section clearly refers to 'any contributions' as the subject matter and 'prior to the date of such finding of guilt' as the time factor. The operative words there are mandatory and peremptory and the defendants were ordered to pay the arrears.

[Bahasa Malaysia summary

Defendan telah mengaku salah kepada enam tuduhan kerana gagal membayar caruman di bawah s 7 Akta Keselamatan Sosial Pekerja 1969 ('Akta itu') dan telah didenda RM300 bagi setiap tuduhan, atau dua minggu penjara jika ingkar membayar denda. Pihak pendakwa telah mengemukakan suatu penyata yang diperakui berkenaan dengan tunggakan caruman di bawah s 94A(1) dibaca dengan s 94C Akta itu yang termasuk tunggakan caruman yang tidak terhad kepada isi enam tuduhan tersebut, yang berjumlah RM21,774.50 ('tunggakan itu'). Bagaimanapun, majistret enggan memerintahkan pembayaran tunggakan itu atas alasan bahawa pihak pendakwa hanya boleh mendapatkan balik caruman yang menjadi isi tuduhan untuk mana terdapat suatu keputusan bersalah. Pihak pendakwa telah membuat rayuan.

Diputuskan, membenarkan rayuan itu: A

Di bawah s 94A(1) Akta itu, mahkamah hendaklah memerintahkan sesiapa yang didapati bersalah kerana melakukan apa-apa kesalahan di bawah s 94(a) untuk membayar 'apa-apa caruman, ... sebelum tarikh didapati bersalah' yang genap masa dan kena dibayar kepada Pertubuhan Keselamatan Sosial. Tidak terdapat ketaksaan kerana B seksyen itu dengan jelas merujuk kepada 'apa-apa caruman' sebagai isinya dan 'sebelum tarikh didapati bersalah' sebagai faktor masanya. Perkataan yang penting di situ bersifat mandatori dan memerintah dan defendan diperintahkan membayar tunggakan itu.]

Cases referred to C

Goff, Reginald W, QC, Re [1962] MLJ 241 (refd)
PP v Pontian Bas Bhd [1988] 2 MLJ 530 (refd)
PP v Silectron Sdn Bhd [1993] 2 AMR 27:1172 (not folld)

Legislation referred to D

Employees Provident Fund Act 1951 s 16A(4)
Employees' Social Security Act 1969 ss 7, 94(a), (c), 94A(1)
Employees' Social Security (General) Regulations 1971 reg 32

Zahir Hussein Ahmad Shah (Deputy Public Prosecutor) for the Public E Prosecutor.
Chong Ket Vui (*Chong Ket Vui & Co*) for the respondents.

Suleiman Hashim J: On 20 August 1993, defendants were charged with having committed six offences on 12 March 1991, two in respect of each employee, for failure to pay the contributions in respect of the employees F as required under s 7 of the Employees' Social Security Act 1969 ('the Act') and reg 32 of the Employees' Social Security (General) Regulations 1971, punishable under s 94(a) of the Act.

On 20 August 1993, the defendants pleaded guilty to all six charges and were fined RM300, in default two weeks' imprisonment in respect of G each charge. I believe the fines have been paid.

There is only one issue in this appeal by the deputy public prosecutor, the interpretation of s 94A(1) of the Act.

The prosecution had tendered the certified statement of arrears of contributions under s 94A(1) read with s 94C of the Act which included H arrears of contributions not only the subject matter of the present six charges but also, under s 94A(1) of the Act, contributions 'prior to the date of such finding of guilt', total amount RM21,774.50. The magistrate declined to order payment of the arrears of the contributions, total amount RM21,774.50.

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The magistrate said:

> The prosecution had earlier submitted a statement of the arrears of contributions dating back from January 1989 to July 1990 which when looking at it (the statement) are in respect of employees which are not the

A subject matter of the charges before which the defendant had pleaded guilty. No doubt that the statement satisfied s 94C of the Socso Act, but this court cannot make an order that the defendant pay those contributions which are not in respect of the employees and the subject matter of the charges before this court.

Based on the above authorities, I therefore find that the prosecution
B can only recover contributions which are the subject matter of the offence for which there is a finding of guilt.

The authority relied on by the magistrate is *PP v Silectron Sdn Bhd* [1993] 2 AMR 27:1172 which referred to *PP v Pontian Bas Bhd* [1988] 2 MLJ 530, SC. *Silectron Sdn Bhd* was in respect of the interpretation of s 16A(4)
C of the Employees Provident Fund Act 1951 ('the EPF Act'). The magistrate found the two sections, s 94A(1) of the Act before him and s 16A(4) of the EPF Act, 'almost in pari materia in their wording'. The magistrate no doubt felt bound by the doctrine of stare decisis, *PP v Datuk Tan Cheng Swee* [1980] 2 MLJ 276, FC.

D Section 94A(1) of the Act states:

> Upon any person being found guilty of any offence under para (a) of s 94, the Court before which the person is found guilty shall order such person to pay to the Organisation the amount of any contributions, together with any interest credited thereon, due and payable to the Organisation and certified by the authorised officer of the Organisation to be due from such person
> E prior to the date of such finding of guilt.

Section 16A(4) of the EPF Act is:

> Upon being found guilty of any offence under s 16A(l)(c) the Court before which the employer is found guilty shall order such employer to pay to the
> F Board the amount of any contributions, together with any dividend credited thereon, due and payable to the Board and certified by an officer authorised by the Board to be due from such employer, prior to the date of such finding of guilt and such contributions shall be recoverable in the same manner as a fine; and any order made under this subsection shall be appealable as if it were an order for payment of compensation under s 426 of the Criminal
> G Procedure Code.

I can be wrong but with utmost respect I do not agree with the judgment in *Silectron Sdn Bhd.*

Indeed, although the judgment in *Silectron Sdn Bhd* referred to *Pontian Bas Bhd*, a judgment of the Supreme Court, the judgment in
H *Silectron Sdn Bhd* did conclude with, 'Therefore, with respect, *Pontian Bas* has no relevance whatsoever in so far as the present case is concerned'.

In all humility, I would like to repeat that I can be wrong but with utmost respect I do not agree with the judgment in *Silectron Sdn Bhd* that to give the interpretation as advanced by the prosecution would be to give
I 'such a wide interpretation', that 'it cannot be the intention of the EPF Act that the court is under a duty to make an order in respect of contributions other than those which have become the subject matter of the charges against the respondent and for which the respondent has been charged and found guilty', that 'the inference is that the order that the court must make

under that subsection must relate only to the contribution which is the subject matter of the offence under s 16A(1)(c) for which there has been a finding of guilt'. A

With utmost respect, if the legislature had intended contributions to be only in respect of [or] contributions to be only restricted to offence/s for which there has/have been a finding of guilt, the legislature would have said so. Instead, in the two sections, the legislature did say 'any contributions, ... prior to the date of such finding of guilt'. I think the operative words are 'any contributions' and 'prior to the date of such finding of guilt'. B

The judgment in *Silectron Sdn Bhd* goes on to say, 'Even assuming the words, "... the amount of any contributions ... prior to the date of such finding of guilt ..." create an ambiguity ...'. C

Thus only 'even assuming', not that there is any ambiguity.

With utmost respect, I agree there is no ambiguity. It clearly, plainly, unambiguously refers to 'any contributions' as the subject matter and 'prior to the date of such finding of guilt' as the time factor. D

I think the operative words in the two sections are 'mandatory and peremptory'. And some 32 years ago in *Re Reginald W Goff, QC* [1962] MLJ 241, Thomson CJ had occasion to say:

> The opening words of the section are clearly mandatory and peremptory and in my view they constitute a condition precedent which must be complied with before a petition can be heard. I have examined the Ordinance with very great care and I can discover no provision in it which enables me to exercise any discretion to dispense with that condition precedent. I appreciate that in the present case there would be very great difficulties facing the petitioner in complying with it. I appreciate that it is reasonable to suppose the petitioner would have no difficulty whatsoever in complying with the condition. But these considerations, to my mind, do not justify me in disregarding a condition precedent which is framed in mandatory and peremptory terms and to dispense with which the law gives me no discretion. E F
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> Judges are not here to make the law. They are not here to find faults in the law ... They are here to administer and declare the law as it has been set out by the legislature. If, therefore, what I have said creates any difficulty it is a matter for the legislature to deal with. After all I am here to enforce the law. I am not here to set a bad example to the public by driving a coach and horses through it. G

In the present matter before me, I think the operative words in the two sections are 'framed in mandatory and peremptory terms and to dispense with which the law gives me no discretion'. H

I allow this appeal by the deputy public prosecutor. I order that defendants do pay up the arrears of the contributions, total amount RM21,774.50.

Appeal allowed. I

Reported by Anne Khoo